



BEFORE THE FEDERAL TRADE COMMISSION

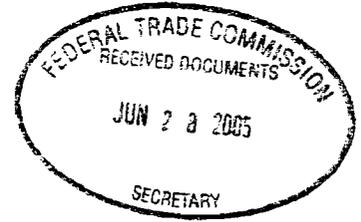
Washington, D.C. 20580

*In the Matter of*

CAN-SPAM Act Rulemaking, Project No. R411008

*Comments of*

**United Online**



United Online submits these comments pursuant to the request of the Federal Trade Commission (the "Commission") for comment on the CAN-SPAM Act (the "Act") published on May 12, 2005.

United Online is one of the nation's leading providers of value-priced Internet access services. Through the NetZero, Juno, and BlueLight Internet access brands operated by United Online's wholly-owned subsidiaries, consumers are provided high quality, easy-to-use free and value-priced Internet access and e-mail. United Online is committed to protecting the privacy of the members of its subsidiaries' services, and, therefore supports the goals of the Act.

United Online directs its comments toward the FTC's proposed three (3) business day requirement for processing opt-out requests and its question regarding whether payment needs to be made in order for there to be a transactional relationship created.

United Online respectfully submits that this is too short a time period. Processing an opt-out notice is not entirely an automated process. When receiving an opt-out request, it is necessary to authenticate the e-mail address, in order to make certain that the e-mail is an individual e-mail and not sent as part of some automated attack on United Online conducted by an Internet hacker or competitor. United Online must also confirm the extent of the opt-out request to make sure that the individual is not deleted from mailing lists that the member wants to remain on. Once the validity and extent of the opt-out is determined, United Online must have the e-mail address deleted from the lists that it maintains as well as the list maintained by service providers.

While in the ordinary course of business, United Online expects to accomplish the processing of an opt-out within five (5) business days. However, there may be certain times when the system itself is down, or unavailable for processing, there is limited personnel available to process the request or when upgrades or modifications to the web site or computer systems may make it difficult or impossible to do so. Therefore, under ordinary circumstances, United Online expects the change to be accomplished with 3-5 business days, United Online believes it is unreasonable to expect that an opt-out will be properly processed in every situation within three (3) business days and believes the current ten (10) business day time period should be maintained.



United Online does not target recipients who submit opt-out requests for receipt of additional commercial e-mail. While United Online typically would take less than ten (10) business days to process an opt-out request, if United Online took ten (10) business days to do so there is approximately a 25% chance that a recipient would receive another e-mail communication while the opt-out request is being processed. Therefore, United Online respectfully requests that the FTC maintain the ten (10) business day requirement.

With respect to consideration, it is a fundamental principle of contract law that consideration need not be monetary in nature. For a contract to have valid consideration, the contract must be a bargained-for exchange. *Restatement (Second) of Contracts* § 71. To be “bargained-for,” the consideration induces the making of the promise and the promise induces the furnishing of consideration. *Id*

In the offline context, there are many companies, particularly retailers, that provide discounts to consumers in exchange for the consumer agreeing to provide his/her e-mail address and join a frequent purchaser or other club.

In the online context, an Internet service provider’s agreement may offer to provide a valuable service at no cost to the individual in exchange for the consumer agreeing to view advertising. For example, an agreement to provide no-cost Internet access, access to content, an e-mail account, and/or a web page, can constitute consideration for the individual’s agreement to take on certain requirements, e.g. agreeing to comply with the terms and conditions of the service, accepting the terms of a software license, agreeing to accept pop-up or other types of online advertisement and/or agreeing to receive promotional e-mail messages. Under these circumstances, an individual has bargained for the opportunity to receive the beneficial service in exchange for accepting these types of obligations.

United Online, as one of the leading no-cost and discounted Internet service providers, has had a great deal of experience in entering into bilateral agreements with its members providing valuable services at no monetary cost. For ten years, United Online (and its predecessors in interest) and its subsidiaries have entered into millions of bilateral agreements with users of free Internet access and electronic mail services.

United Online has previously expressed its position in earlier comments. United Online strongly maintains its belief that when a recipient has entered into a transaction with a sender that entitles the recipient to receive future newsletters or other electronically delivered content, the primary purpose should be deemed a “transactional or relationship message.” This will acknowledge the commonly adopted practice in the marketplace where individuals affirmatively agree to receive commercial messages from senders.

If the FTC does not accept this position, we believe it will harm consumers in that Internet service providers may, in the short or long term, discontinue or more narrowly limit the no cost services they provide.

Further, we believe that the FTC is being overly protective of consumers, who have the right to enter into commercial transactions by which they affirmatively consent to receive

commercial e-mails. Whether a consumer is signing up for a frequent buyer's club at a bricks and mortar or signing up for no-cost or low-cost Internet service the experience should be the same. While United Online is concerned about the privacy of individual consumers, and wants to reduce the burdens of unsolicited commercial e-mail, when a consumer enters into an agreement to receive certain types of e-mails, by definition, the e-mails are no longer unsolicited. Put in another way, if a consumer can opt-out at will from bilateral agreements by which the consumer has agreed to receive commercial e-mails, it will likely serve as a commercial disincentive for Internet and other service providers to offer no-cost services, which would harm both the service providers (who could no longer profitably provide the service) and the consumers (who would no longer have the option of receiving the service at no-cost). This is an unnecessary risk of economic harm that the proposed rules would impose on consumers, because the consumers can choose whether or not to agree to receive such services.

Finally, United Online is mindful of the language in 15 U.S.C. § 45(n), which states that a practice is unfair under Section 5 if it causes, or is likely to cause substantial injury to consumers that is not reasonably avoidable and is not outweighed by the countervailing benefits to consumers or to competitors. While the language may not be directly applicable here, it is analogous in that consumers can certainly reasonably avoid entering into a commercial transaction by which they bargain for the receipt of e-mails. Further, the benefit to consumers of receiving valuable Internet services at no cost and providing no-cost and low cost alternatives to higher priced Internet services is of sufficient benefit to consumers that it outweighs the harm to consumers who knowingly bargain to receive e-mails as part of the receipt of a no cost or low cost Internet service.

We appreciate the opportunity to comment on this proceeding and we hope that you will take United Online's suggestions into consideration.

Respectfully submitted,

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